



COMMONWEALTH OF MASSACHUSETTS
Board of Registration
of
Hazardous Waste Site Cleanup
Professionals

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PROFESSIONAL CONDUCT COMMITTEE

Minutes of Meeting September 15, 2011

[Approved on November 15, 2011]

Prepared by: Terry Wood

Meeting Location: New Bedford Whaling Museum, 18 Johnny Cake Hill, New Bedford, MA

List of Documents Used at the Meeting:

1. Agenda
 2. Draft Minutes of meeting on June 23, 2011
 3. Active Case List
 4. Complaint No. 11C-02 and LSP's response, both redacted
 5. Demand letter dated June 22, 2011 from Nicholas Kosiavelon, Esq.
 6. Demand letter dated August 4, 2011 from Scott J. Nathan, Esq.
 7. Memorandum dated September 2, 2011 to Board from Allen Wyman, Investigator regarding an LSP recently convicted of theft
 8. Letter dated September 6, 2011 requesting Advisory Ruling
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1. **Call to Order:** Robert Luhrs called the meeting to order at 1:28 p.m. Also present were Elizabeth Callahan, Gail Batchelder, Kirk Franklin, Christophe Henry, Gretchen Latowsky, Kelley Race, and Farooq Siddique. Committee members absent: Deborah Farnsworth, Jack Guswa and Christophe Henry. Staff members present were Beverly Coles-Roby, Al Wyman, Terry Wood and Lynn Read. Also present were Wendy Rundle, LSP Association Executive Director, Suzanne Courtemanche, LSPA President, and Wes Stimpson of the LSPA.
 2. **Announcements:** Ms. Wood stated that the Agenda has been modified by adding the request for advisory ruling that was e-mailed to the Board on September 8, 2011 as New Business item 5D. She also stated that the new Complaint 11C-03 that was e-mailed to Committee members on September 14, 2011 could be added as 5E if the committee wants to address it now, or it could be postponed to the next meeting. The consensus of the

Committee was to decide later in the meeting whether sufficient time remained to review Complaint No. 11C-03.

- 3. Review of Draft Minutes:** The draft minutes of the meeting held on June 23, 2011 were approved as written.

4. Old Business

A. Status of CRTS

At Mr. Luhrs's request, the chair of each Complaint Review Team reported on progress made since the June meeting.

B. Report from Screening Team re: Complaint No. 11C-01

At its meeting on June 23, 2011, the Board had appointed a Screening Team to obtain additional information about the allegations raised in Complaint 11C-01 and report back to the Board. The complainant was an LSP (LSP #1) who had submitted a Response Action Outcome Statement (RAO) in 2005. The LSP who was the subject of the complaint (LSP #2) was the successor LSP to LSP #1. LSP #2 conducted work at the site in response to a Notice of Noncompliance issued by MassDEP regarding the 2005 RAO submittal filed by LSP #1. The allegations in LSP #1's complaint included that LSP #2 improperly retracted the 2005 RAO, harming the new owner's financing of the property, and that LSP #2 conducted excessive soil, groundwater, and air sampling without notice to the new owner and without detecting any significant contamination, and made submittals on behalf of a corporation that no longer existed.

At this September 15, 2011 meeting, having reviewed the complaint, the response, both RAOs and other documents, the screening team recommended that the Board dismiss the complaint without investigation by a Complaint Review Team on the grounds that the allegations, if true, would not warrant discipline against the LSP.

The screening team reported that LSP #2 believed additional data was needed to adequately characterize areas underneath the on-site building and to assess potential indoor air risks to the building occupants. The members present discussed that the Board generally does not investigate allegations that an LSP conducted too much assessment, particularly when the complainant is not the LSP's client. A motion was made and seconded to dismiss the complaint. All committee members voted in favor with one abstention (Ms. Listernick).

5. New Business

A. Complaint 11C-02

Ms. Race recused herself from discussion of this complaint and left the room.

This complaint was filed by a member of a Public Involvement Process group for a contaminated site. The complaint alleged that the LSP had violated the Board's conflict of interest regulation (309 CMR 4.04) by providing professional services at a hazardous waste site and appearing on behalf of the same client before several town boards. The complaint stated that the LSP had

made a presentation on behalf of the client before the town's water and sewer commission seeking rezoning of a parcel of land and also petitioned for a special permit from the planning board for more intensive commercial use of the hazardous waste site.

The LSP stated in a written response that the parcel of land for which the LSP sought rezoning was not part of the adjacent disposal site and that the LSP's presentations to the town boards were not professional services pursuant to the Board's regulations and, as a result, the Board did not have jurisdiction over such activities. The LSP also wrote that the appearance before the planning board was to seek a special permit to allow the use of certain chemicals in a new building planned for construction on a section of property that included a portion of the disposal site as well as a portion of an adjacent parcel. The LSP stated that this presentation was unrelated to the LSP's work on the disposal site and also was not 'professional services.' The LSP also stated that it is not a conflict of interest under the Board's regulations to represent the same client on more than one property.

The committee members present discussed the complaint and the LSP's response. The members observed that the complaint did not identify any specific flaws in the submittals the LSP filed regarding the contaminated parcel. A motion was made and seconded to dismiss the complaint on the grounds that the Board has no jurisdiction over the LSP's presentations to the town boards and also because the allegations in the complaint did not allege any conduct that would constitute a conflict of interest pursuant to 309 CMR 4.04. The motion passed unanimously. The Committee members instructed the staff to prepare a draft denial letter for the members' review.

Ms. Race returned to the room.

B. Recent tort claims made against the Board

Ms. Wood reported that the Board had recently received two demand letters pursuant to M.G.L. c. 258, § 4. One from an attorney representing two homeowners whose above-ground oil storage tank had leaked and one from an attorney representing the homeowners' insurer. The two letters were essentially identical and asserted that an LSP's work at the site had been deficient. The letters alleged that the Board was liable under the Massachusetts Tort Claims Act for damages resulting from the LSP's deficient work, citing the case of Commonwealth v. Eskanian, 74 Mass. App. Ct. 666, 672 (2009). The initial version of this case had stated that LSPs are "quasi governmental workers... the LSP remains an agent of the government." At the time the decision was issued, the Attorney General's office requested that the court remove this language. The Appeals Court agreed and, on August 31, 2010, ordered this language be removed from the opinion.

Ms. Wood reported that Ms. Read had informed both attorneys that the Eskanian decision had been corrected and, as a result, any legal basis for the claims against the Board was eliminated. However, neither party has withdrawn their claim.

Ms. Wood reported that the demand letters were addressed to the Secretary of EOEEA, who has six months under the statute to respond and, if no response is made, the claims are deemed denied. Board staff will work with EOEEA to draft responses.

C. Recent felony conviction against an LSP

The committee members present discussed Mr. Wyman's memorandum regarding an LSP's recent conviction in Maine of theft by deception. The LSP operates a beverage-container redemption facility in Maine and was convicted of stealing in excess of \$10,000 from Maine bottle manufacturers, distributors and collection agents by paying refunds and collecting handling fees for cans and bottles the LSP knew were coming from outside the state. The Board's regulations at 309 CMR 7.01(3) state that this type of conviction constitutes misconduct and may be grounds for discipline. After discussion of the memorandum, the committee members asked the staff to review what, if any, actions other licensing boards take when a licensee is convicted of a similar crime. The committee tabled further discussion of this topic until the next meeting.

D. Request for Advisory Ruling

The Board received a written request from an LSP for an advisory ruling whether the LSP's actions were consistent with the Board's Rules of Professional Conduct. The LSP stated in the request that, as part of response actions completed for a previous owner, the LSP identified the extent of a dissolved contaminant plume that extends off the source property and beneath several residential properties. While most of the residences are connected to municipal water, one residence has a private well and the LSP stated that this resident refused offers to connect the home to municipal water. As part of an Immediate Response Action, this home was connected to a point-of-entry treatment system (POETS) that filters the drinking water supply. The LSP stated that the previous owner filed for bankruptcy, a second owner bought the source property, and the LSP remained as LSP-of-Record.

The new owner's position is that he bears no responsibility for the off-site residence and recently told the LSP to discontinue sampling, operation and maintenance of the treatment system effective immediately but continue response actions associated with the rest of the disposal site. The LSP stated that, if the POETS were to totally fail or when breakthrough occurs, the Resident will ingest water at concentrations above drinking water standards. The LSP stated that s/he has provided numerous e-mails to the client regarding the LSP's interpretation that the client is obligated to continue operation of the POETs, and has provided to MassDEP, in the context of IRA status reports and email, a summary of the operation of the POETS and a statement that the new owner does not believe he has a responsibility to continue operation or maintenance of the system.

The LSP requested an advisory ruling: 1) whether the LSP has fulfilled the obligation to notify the client and/or MassDEP pursuant to 309 CMR 4.03(4) and 309 CMR 4.03(6), and 2) whether the LSP has fulfilled the requirement of 309 CMR 4.03(1) "to hold paramount public health." The Board discussed the information in the letter and whether the members wanted to provide an advisory ruling in response. The consensus of the Board was to ask the staff to draft a response for the Board's review at the next meeting.

E. Complaint 11C-03

The members present decided to postpone consideration of this complaint because they received it on September 14, 2011, one day before this meeting, and several members had not had time to review it.

6. Future Meetings

The Committee scheduled a meeting for November 15, 2011, at a location to be determined.

7. Adjournment: The meeting was adjourned at 4:47 p.m.